

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

-----  
In re:

*Cormelle M. Horton,*

Debtor.

-----

BKY 04-30658 DDO

Chapter 13 Case

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF  
CHAPTER 13 PLAN**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorney, moves the court for the relief requested below and gives notice of hearing.

2. **NOTE: CONTESTED MATTERS ONLY THAT WERE  
ORIGINALLY SCHEDULED TO BE HEARD BEFORE JUDGE O'BRIEN ON  
SEPTEMBER 9, 2004 ARE CONTINUED FOR HEARING TO OCTOBER 14,  
2004.** The court will hold a hearing on this motion at 10:30 a.m. on October 14, 2004, in Courtroom 228A, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 13, 2004 which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than October 8, 2004 (due to Columbus Day Holiday), which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The Chapter 13 petition commencing this case was filed on February 6, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the Debtor's proposed Chapter 13 plan dated August 5, 2004 (the "Plan").

6. On February 6, 2004, the Debtor filed a Chapter 13 plan providing for a payment of \$75 per month for 36 months, for a total of \$2,700 to be paid to the Chapter 13 Trustee for distribution to creditors, which was confirmed on April 8, 2004. The plan projected a 26% repayment to creditors based upon estimated claims. The Debtor now seeks confirmation of a modified plan to cure arrearages in her payments to the Chapter 13 Trustee by reducing the amount of her payments to the Chapter 13 Trustee, retaining the same plan term as the original plan. The Plan provides for payments of \$50 per month for 31 additional months, for a total of \$1,550 to be paid to the Chapter 13 Trustee for distribution to creditors. The plan projects no more than a 3% return to unsecured creditors, based upon unsecured claims filed prior to expiration of the claims bar date.

7. According to the Trustee's records, the Debtor has made only two payments of \$75 during the pendency of her 36-month plan, the first on March 31, 2004, and the second on May 13, 2004. She now proposes to pay an additional 31 payments of \$50 per month beginning in September, 2004, retaining the original plan's term of 36 months, producing a much smaller percentage return to unsecured creditors, and thereafter receive a discharge of her remaining debts under 11 U.S.C. § 1328(a).

8. As such, the Debtor seeks to obtain a discharge of her remaining unsecured debts after making no more than 33 payments to the Chapter 13 Trustee, for a total distribution to creditors of 3%.

9. It is the Trustee's position that the current modified plan unfairly manipulates the provisions of the Bankruptcy Code to the detriment of unsecured creditors. The Debtor has benefited from the protection afforded by the automatic stay in Chapter 13 for seven months as of the date of this Motion, while making only two payments to the Chapter 13 Trustee. It is the Trustee's position that the three-year period contemplated by the Statute means that a debtor must make at least 36 payments, not simply remain in Chapter 13 for 36 months, without regard for missed payments during the pendency of a 36-month plan.

10. Feasibility of the Plan is also an issue. Based upon the facts alleged in the Debtor's Motion seeking confirmation of the Plan, she is now unemployed, and relying on child support and public assistance in order to provide for herself and her child. Any adverse change in her financial circumstances suggests that it is unlikely she will be able to make the payments required by the Plan. It is the Trustee's position that the Plan violates 11 U.S.C. § 1325(a)(6).

11. If necessary, the Debtor and/or representatives of the Chapter 13 Trustee may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests that confirmation of the Debtor's proposed Chapter 13 plan be denied, and such other relief as may be just and equitable.

Jasmine Z. Keller, Trustee

Dated: August 31, 2004

/e/ Margaret H. Culp

Thomas E. Johnson, ID # 52000

Margaret H. Culp, ID # 180609

Counsel for Chapter 13 Trustee

12 South 6th Street, Suite 310

Minneapolis, MN 55402-1521

(612) 338-7591

### **VERIFICATION**

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: August 31, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

-----  
In re:

BKY 04-30658 DDO

*Cormelle M. Horton,*

Chapter 13 Case

Debtor.  
-----

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the Debtor in her verified Schedules and Statements on file and of record herein.

LEGAL DISCUSSION

- I. Even if the "best efforts" test does not apply to post-confirmation plans, a debtor must provide for a minimum of 36 payments to creditors.

Bankruptcy Code section 1325(a)(1) requires that a plan must comply with the provisions of Chapter 13 and other applicable provisions of Title 11. As indicated in the Statute, the 36-month plan period begins on the date that the first payment is due under the plan. *11 U.S.C. § 1325(b)(1)(B)*. The Debtor's first confirmed plan required that the first plan payment be made in March 2004. From March 2004 to September 2004, the Debtor made a total of two payments of \$75 each. Therefore, the Debtor has made no more than two payments to the Chapter 13 Trustee during the seven-month period she has enjoyed the protection of the automatic stay. There is no support in the record as provided by the Debtor to justify fewer than 36 payments to the Trustee. Maintaining the integrity of confirmed plans is an important part of the Chapter 13 process. *In re Guernsey*, 189 B.R. 477, 482 (Bankr. D. Minn. 1995). Unless the Debtor can provide compelling support for such a modification providing for less than 36 payments, and an effective "meltdown" of the return to unsecured creditors from 26% to 2%, confirmation should be denied.

As of the date of this Motion, the Debtor has remained under the protection of the Bankruptcy Court for seven months, but now seeks release from her concomitant responsibility of making at least 36 payments to the Trustee. In essence, the Debtor seeks to escape the consequences of her payment defaults by filing a modified plan that not only limits her payment obligation to 33 payments, but also frustrates the reasonable expectations of creditors who have been led to anticipate a stream of payments for at least

36 months over the last seven months. It is the Trustee's position that the Debtor's modified plan must continue until the Debtor has made at least 36 payments in order to demonstrate good faith. Anything less constitutes an unfair manipulation of the Bankruptcy Code. *In re Debing*, 202 B.R. 291 (Bankr. D. Minn. 1996); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995); *In re Guernsey*, 189 B.R. 477 (Bankr. D. Minn. 1995); *In re Nelson*, 189 B.R. 748 (Bankr. D. Minn. 1995). And see *In re Walters*, 223 B.R. 710, 712 (Bankr. W.D. Missouri 1998); *In re Vasquez*, 261 B.R. 654 (Bankr. N.D. Tex. 2001).

- II. In order to confirm a Plan, under 11 U.S.C. § 1325(a)(6), the Court must find that the Debtor will be able to make all payments under the Plan and comply with the Plan.

Based upon the Debtor's moving papers, it appears that her financial circumstances have worsened since the filing. It is unreasonable to suppose that she will be able to make the payments called for by the Plan when her primary source of income is child support and public assistance. Her budget at filing appeared to be strained to the maximum extent possible to enable her to make plan payments. Under her present circumstances, it appears far less likely, if not impossible, that she will be able to continue to make even reduced payments.

### CONCLUSION

For the reasons stated herein, confirmation of the Debtor's proposed Chapter 13 plan should be denied.

Respectfully submitted:

Dated: August 31, 2004

/e/ Margaret H. Culp  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
12 S. 6th Street, Suite 310  
Minneapolis, MN 55402-1521  
(612) 338-7591

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

-----  
In re:

BKY 04-30658 DDO

*Cormelle M. Horton,*

Chapter 13 Case

Debtor.  
-----

**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on August 31, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Plan, Memorandum of Facts and Law and proposed Order on the individual(s) listed below, in the manner described:

**By facsimile transmission:**

United States Trustee  
612-664-5516  
Curtis K. Walker, Esq.  
612-824-8005

**By first class U.S. mail:**

Cormelle M. Horton  
1910 Oakdale Avenue, #102  
St. Paul, MN 55118

Curtis K. Walker, Esq.  
Walker Law Office  
4356 Nicollet Avenue South  
Minneapolis, MN 55409-2033

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: August 31, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

-----  
In re:

*Cormelle M. Horton,*

Debtor.

BKY 04-30658 DDO

Chapter 13 Case

-----

**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN**

At St. Paul, MN, \_\_\_\_\_, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the Debtor's proposed Chapter 13 plan.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

Confirmation of the Debtor's proposed Chapter 13 plan dated August 5, 2004 is **DENIED**.

\_\_\_\_\_  
Dennis D. O'Brien  
United States Bankruptcy Judge